

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 26, 2007

**SHAWN RAFAEL BOUGH v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Knox County  
No. 84510 Richard Baumgartner, Judge**

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**No. E2007-00475-CCA-R3-PC - Filed October 18, 2007**

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The petitioner, Shawn Rafael Bough, appeals the Knox County Criminal Court's denial of his petition for post-conviction relief from his convictions for first degree felony murder and especially aggravated robbery and resulting concurrent sentences of life and twenty-one years, respectively. On appeal, he contends that he received the ineffective assistance of counsel because his trial attorney (1) failed to object to the introduction of the victim's 911 tape into evidence; (2) failed to object when a State witness testified about an uncorroborated confession made by the petitioner; (3) failed to object to an improper comment made by the prosecutor during his closing statement; (4) failed to ask for a curative instruction when the prosecutor mentioned during his closing statement that the defense had failed to produce an alibi witness alluded to during the trial; (5) failed to object when the trial court improperly instructed the jury on the underlying felony for first degree murder; and (6) failed to investigate his case adequately. Upon review of the record and the parties' briefs, we affirm the post-conviction court's denial of post-conviction relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

James L. Flanary, Knoxville, Tennessee, for the petitioner, Shawn R. Bough.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Ta Kisaha M. Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

The evidence at trial revealed, in pertinent part, that on December 19, 1998, sisters Deanna and Edie Jones began their winter break from their studies at Knoxville College. State v. Bough, 152

S.W.3d 453, 456-57 (Tenn. 2004). The women rented room 207 at the Expo Inn for the night and planned to catch a flight home to New Jersey the next day. Id. at 457. While checking in, the sisters saw the petitioner and codefendant Craig Shears, also students at Knoxville College, in the parking lot and invited them to come up to their room later. Id. Montes Best began working at the hotel's front desk at 11:00 p.m. and remembered seeing two African-American males that night who claimed to be looking for room 207. State v. Shawn Rafael Bough, No. E2002-00717-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 17, at \*3 (Knoxville, Jan. 12, 2004). The petitioner and his codefendant stopped by room 207 a few minutes before midnight and again after midnight. Bough, 152 S.W.3d at 457. The petitioner used the room's telephone, trying to arrange a flight home to California. Id. Deanna Jones saw the petitioner with a gun and saw him put the gun in his sock before he left her room. Id. The petitioner and his codefendant returned to the room two more times that night. Id. Deanna Jones testified at trial that it was still dark when the two men left her room for the final time on the morning of December 20. Id. However, she told police on the day of the crimes that the petitioner and Shears left the room around 9:00 a.m. Id.

Around 10:00 a.m., Deanna and Edie Jones heard what sounded like three or four gunshots downstairs in the Expo Inn's lobby. Bough, No. E2002-00717-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 17, at \*7. Knoxville Police were dispatched to the hotel just after 10:00 a.m. in response to the hotel desk clerk's 911 call about a robbery and a shooting. Bough, 152 S.W.3d at 457. When officers arrived at the scene, hotel clerk Billy Oldham told them that two tall, thin African-American men from room 207 had robbed and shot him. Id. 457-58. The victim had been shot four times and later died as a result of his wounds. Bough, No. E2002-00717-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 17, at \*7. Dante Smith testified at trial that he drove to the Expo Inn on December 20 in response to the petitioner's repeated telephone calls and picked up the petitioner and Craig Shears shortly after 10:00 a.m. Bough, 152 S.W.3d at 457. The petitioner and Shears came running out of the hotel lobby, and the petitioner told Smith that he had shot someone and thought he had killed the person. Id. Smith dropped off the petitioner and Shears near Knoxville College and returned to his apartment. Id. The petitioner and Shears later arrived at Smith's apartment and began counting money. Id. The petitioner asked Smith to hide a gun for him, but Smith refused and asked the petitioner if he was crazy. Id. Isaiah Dixon, the petitioner's friend, testified at trial that he saw the petitioner in California sometime after the crimes were committed. Id. at 458. Dixon said the petitioner told him that the petitioner "was trying to pull a heist" and that the petitioner claimed to have "let [the clerk] have it" because the clerk was taking too long to open the safe. Id. Police arrested the petitioner at his mother's California home in May 1999. Id. In a statement to Knoxville Police Officer A.J. Loeffler on the day of his arrest, the petitioner said that he had stayed with Edie and Deanna Jones at a hotel but that he left the hotel around 9:30 a.m. the next day. Id. The petitioner also stated that after he left the hotel, someone named Ted drove him and Shears to the Nashville airport. Id.

Although the petitioner had been charged with first degree premeditated murder, first degree felony murder, and especially aggravated robbery, the jury convicted him of the latter two offenses. Id. at 458-59. On direct appeal, this court concluded that the petitioner's motion for new trial had been filed untimely as to the felony murder conviction and waived all issues regarding that

conviction except sufficiency of the evidence. Bough, No. E2002-00717-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 17, at \*\*19-21. This court also concluded that the petitioner's amended motions for new trial in regards to the especially aggravated robbery conviction had been untimely filed and addressed only the issues raised in his original new trial motion as to that offense. Id. at \*\*21-23. This court affirmed both convictions. Id. at \*\*2-3. On appeal to our supreme court, the supreme court affirmed this court's rulings on the issues it had addressed but held that the new trial and amended new trial motions had been timely filed and remanded the case to this court for reconsideration of the issues this court had deemed waived. Bough, 152 S.W.3d at 456. On remand, this court again affirmed the petitioner's convictions. State v. Shawn Rafael Bough, No. E2004-02928-CCA-RM-CD, 2005 Tenn. Crim. App. LEXIS 32, at \*2 (Knoxville, Jan. 19, 2005), perm. to appeal denied, (Tenn. 2005).

Subsequently, the petitioner's post-conviction counsel filed a timely petition for post-conviction relief, arguing that the petitioner had received the ineffective assistance of trial counsel. At the evidentiary hearing, counsel argued that trial counsel had been ineffective because he (1) failed to object to the introduction of the victim's 911 tape into evidence; (2) failed to object when a State witness testified about an uncorroborated confession made by the petitioner; (3) failed to object to an improper statement made by the prosecutor during his closing statement; (4) failed to ask for a curative instruction when the prosecutor mentioned during his closing statement that the defense had failed to produce an alibi witness alluded to during the trial; (5) failed to object when the trial court improperly instructed the jury on the underlying felony for first degree murder; and (6) failed to investigate the petitioner's case adequately.

The petitioner testified at the hearing that the victim's 911 tape was supposed to be suppressed from the evidence at trial but that trial counsel did not object to the tape and told him that "the argument was lost on it." During the State's closing argument, the prosecutor referred to several witnesses as being "birds of a feather." The prosecutor implied that because the witnesses were involved in activities with drugs and guns and knew the petitioner, the petitioner also was involved in those activities. However, prior to his arrest for these crimes, the petitioner had never been arrested or convicted of a crime. The prosecutor also made a comment during his closing statement about Ted not testifying for the defense. The petitioner stated that Isaiah Dixon testified against him at trial and told the jury that the petitioner had admitted robbing and shooting the victim. Counsel failed to object to Dixon's testimony. The petitioner stated that he had been charged with first degree felony murder with robbery as the underlying felony. However, during the jury instructions, the trial court instructed the jury on the underlying felony of especially aggravated robbery. The petitioner said that between 1999 and 2001, trial counsel met with him about two times and that each meeting lasted less than one hour. He stated that counsel should have been present at some of his codefendant's trial proceedings and that he wanted a new trial with effective counsel to represent him.

On cross-examination, the petitioner testified that his codefendant also was convicted of first degree felony murder and especially aggravated robbery. The petitioner denied having previous arrests in California for possession of marijuana for resale and being a fugitive from justice.

However, he acknowledged being arrested in 2001 in California for taking a vehicle without consent. At some point after his arrest for the offenses in this case, the petitioner was able to post bond and returned to California. He stated that the only time counsel could have met with him was when the petitioner returned to Tennessee for his court date because counsel never flew to California to visit him. The petitioner stated that when the trial court instructed the jury on the incorrect underlying felony, the State “constructively amended” the indictment. He stated that the incorrect instruction was improper because the jury found him guilty of something for which he had not been indicted. The petitioner stated that Isaiah Dixon was not involved in the crimes and was not charged as an accomplice. He acknowledged that during the trial, he testified that Ted picked him up before the crimes occurred and dropped him off at a location other than the Expo Inn, making it impossible for the petitioner to have committed the crimes. The petitioner acknowledged that when the prosecutor mentioned Ted during his closing statement, the prosecutor was trying to point out to the jury that Ted could have corroborated the petitioner’s story. The petitioner said Ted did not testify because he did not know how to find Ted.

Trial counsel testified for the State that he had been an attorney for twenty-five years and hired an investigator to assist him with this case. The investigator interviewed witnesses in Florida, and counsel visited the crime scene and room 207. Counsel also testified about his meetings with the petitioner, and the State introduced counsel’s time sheet into evidence. Counsel testified that he met with the petitioner numerous times from August 2, 1999, until October 25, 1999, when the petitioner posted bond and returned home to California. Counsel stated that his time sheet for the case also showed that he talked with the petitioner and wrote to him numerous times until the petitioner returned to Tennessee. Counsel attended codefendant Craig Shears’ suppression hearing on April 13, 2000, and his trial on November 29 and 30, 2000. Counsel also was present at Shears’ sentencing hearing on January 12, 2001, and spoke with Shears’ counsel.

Trial counsel testified that he did not object to the trial court’s improper jury instruction on the underlying felony because the trial court’s instruction on especially aggravated robbery instead of robbery benefitted the petitioner. He also did not object to the victim’s “compelling” 911 tape being introduced into evidence because the tape was admissible under the dying declaration or excited utterance exceptions to the hearsay rule. Counsel did not remember objecting to the prosecutor’s “birds of a feather flock together” comment but said that “it doesn’t strike me as the kind of comment that we would usually find objectionable.” Regarding Isaiah Dixon’s testimony about the petitioner’s alleged confession to the crimes, counsel stated that he did not object because Dixon was not an accomplice in the case. Counsel objected to the prosecutor’s comment about Ted not testifying at trial but did not ask for a curative instruction when the trial court overruled his objection because “sometimes it’s worse to ask for an instruction rather than to let it go, and I guess that’s what I probably did, looking back on it.”

The post-conviction court denied the petition for post-conviction relief. Regarding counsel’s failure to object to the 911 tape, the court stated that it had presided at codefendant Craig Shears’ trial, that Shears had raised this issue, and that the court had found the tape to be admissible. The court also noted that in this court’s direct appeal opinion, this court also had concluded that the tape

was admissible as a dying declaration or an excited utterance. Therefore, the post-conviction court held that counsel had not been ineffective for failing to object to the tape's admissibility at trial. As to the prosecutor's "birds of a feather flock together" comment during his closing statement, the post-conviction court stated that it had read the closing argument transcript and that it believed counsel's "offhand single comment" was simply challenging the credibility of the witnesses. In any event, the court concluded that given the "great deal of evidence" in the case, the comment did not affect the outcome of the case. As to the prosecutor's referring to Ted's failure to testify for the defense, the court stated that the petitioner had tried to establish an alibi through Ted and that the prosecutor was appropriately pointing out to the jury that Ted would have been a beneficial defense witness. Moreover, the court noted that counsel made a tactical decision not to ask for a curative instruction. Regarding the trial court's improperly instructing the jury on the underlying felony of especially aggravated robbery instead of robbery, the post-conviction court found no prejudice to the petitioner, stating,

I believe that it raises the standard of proof required for the jury to find a felony murder conviction in this case, and if anything, it was beneficial to as opposed to being detrimental to Mr. Bough as it raised the standard of proof that the state had to meet. So, again, I do not believe that there's any basis to find that that was error, and there certainly wasn't any basis for [defense counsel] to object to that at trial.

Finally, the court noted that counsel's time sheet supported his testimony that he met with the petitioner numerous times, investigated the petitioner's case, and attended Craig Shears' pretrial and trial proceedings. The court did not address counsel's failure to object to Isaiah Dixon's testimony. The court concluded that the petitioner was not entitled to post-conviction relief.

## **II. Analysis**

The petitioner contends that he received the ineffective assistance of counsel because his trial attorney (1) failed to object to the introduction of the victim's 911 tape into evidence; (2) failed to object when Isaiah Dixon testified about the petitioner's uncorroborated confession; (3) failed to object to the "birds of a feather flock together" comment that the prosecutor made during his closing statement; (4) failed to ask for a curative instruction when the prosecutor argued during his closing statement that the defense had failed to produce Ted as a witness during the trial; (5) failed to object when the trial court instructed the jury on the improper underlying felony for first degree murder; and (6) failed to investigate his case adequately. The State contends that the post-conviction court properly denied relief. We affirm the judgment of the post-conviction court.

To be successful in a claim for post-conviction relief, the petitioner must prove all factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence."

State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

Initially, we note that the petitioner has failed to include the direct appeal record with the post-conviction record on appeal. Moreover, the petitioner did not ask the post-conviction court or this court to take judicial notice of the direct appeal record. Nevertheless, despite the petitioner's error, this court may take judicial notice of the direct appeal record. See State ex rel. Wilkerson v. Bomar, 376 S.W.2d 451, 453 (Tenn. 1964). We choose to do so in this case.

#### A. Victim's 911 Tape

The petitioner contends that he received the ineffective assistance of counsel when his trial attorney failed to object to the State's introducing the victim's 911 tape into evidence. On direct appeal, the petitioner argued that the trial court improperly allowed the hearsay tape into evidence. In its opinion, this court noted that trial counsel did not object to the tape but ruled that the introduction of the tape was not plain error, stating, "Without definitively addressing the issue, it is certainly more than arguable that the victim's statements were excited utterances, if not dying declarations." Bough, No. E2004-02928-CCA-RM-CD, 2005 Tenn. Crim. App. LEXIS 32, at \*18.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Generally, hearsay statements are inadmissible unless they fall under one of the recognized exceptions to the hearsay rule. Tenn. R. Evid. 802. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Tenn. R. Evid. 802(2). Pursuant to Tennessee Rule of Evidence

804(b)(2), “[i]n a prosecution for homicide, a statement made by the victim while believing that the declarant’s death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death” is also admissible as an exception to the hearsay rule as a dying declaration. A dying declaration has the following five elements:

- (1) The declarant must be dead at the time of the trial;
- (2) the statement is admissible only in the prosecution of a criminal homicide;
- (3) the declarant must be the victim of the homicide;
- (4) the statement must concern the cause or the circumstances of the death; and
- (5) the declarant must have made the statement under the belief that death was imminent.

State v. Hampton, 24 S.W.3d 823, 828-29 (Tenn. Crim. App. 2000).

We have listened to the 911 tape in this case. On the tape, the 911 operator answered the victim’s call and the victim immediately told her, “I’ve been shot. . . . Quick!” He also stated that two African-American men from room 207 shot him three times in the chest and that they fled out the front door. During his conversation with the operator, which lasted about five minutes, the victim stated that “I can’t make it much longer,” “I’m going to pass out in just a minute,” and “Hurry up and get somebody here.” His voice was panting and frantic. We conclude that the tape was admissible as an excited utterance or a dying declaration and, therefore, that the petitioner did not suffer prejudice as a result of his trial attorney having not objected to the tape on the grounds that it was inadmissible hearsay.

#### B. Isaiah Dixon’s Testimony

Next, the petitioner contends that he received the ineffective assistance of counsel because his trial attorney did not object to Isaiah Dixon’s testimony about the petitioner’s uncorroborated confession. On direct appeal, this court ruled that the petitioner waived any argument regarding Dixon’s testimony because he failed to object at trial. See Bough, No. E2002-00717-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 17, at \*34. Nevertheless, this court analyzed whether the confession had been sufficiently corroborated, stating that despite the waiver, “[w]hile there were details that Isaiah Dixon either did not know or got factually incorrect about the incident, the appellant’s overall out-of-court confession to Isaiah Dixon is corroborated by the appellant’s presence at the motel at the approximate time of the incident as well as the testimony of Edie Jones, Deanna Jones, and Dante Smith.” Id. at \*36. Our supreme court also reviewed the issue and affirmed this court’s ruling. See Bough, 152 S.W.3d at 465. Therefore, the petitioner has failed to show that he was prejudiced by

counsel's failure to object to Dixon's testimony.

### C. Prosecutor's "Birds of a Feather" Comment

The petitioner contends, without any explanation, that he received the ineffective assistance of counsel because his trial attorney failed to object when the prosecutor, referring to Isaiah Dixon's prior criminal behavior and lack of credibility, stated during his closing argument that "birds of a feather flock together." In its direct appeal opinion, this court considered whether the statement was plain error and concluded that while the statement "arguably crosses the line into improper expressions of opinion or personal belief as to the credibility of witnesses," the prosecutor made the statement "in direct response to defense arguments that the prosecution witnesses were lying on the stand." Bough, No. E2004-02928-CCA-RM-CD, 2005 Tenn. Crim. App. LEXIS 32, at \*\*28-29. This court also concluded that, in any event, nothing indicated that the statement had adversely affected the jury's verdict. Id. at \*29. The post-conviction court agreed with these conclusions, holding that the statement was not improper and that the petitioner had failed to demonstrate prejudice. We agree that the petitioner has failed to demonstrate prejudice and conclude that the trial court properly denied relief on this issue.

### D. Prosecutor's Missing Witness Statement

The petitioner contends that he received the ineffective assistance of counsel because the prosecutor also mentioned during his closing statement that the defense had failed to have Ted testify about the petitioner's alleged alibi. Although counsel did object to the prosecutor's argument, the petitioner contends that counsel should have asked for a curative instruction.

The record reflects that in the petitioner's recorded statement, introduced during the trial, he claimed that Ted picked him up from the Expo Inn about thirty minutes before the crime. During his closing statement, the prosecutor asked, "Where is Ted? Where is Ted if he is telling the truth in that statement? Could there be a more important witness to hear from?" Defense counsel objected, stating, "We have no burden of proof." The trial court overruled the objection, saying, "I haven't heard anything improper yet. Watch it." During the State's rebuttal closing argument, the prosecutor again referred to Ted's not having testified at trial. Counsel did not renew his objection.

Once again, this court and our supreme court reviewed the missing witness issue on direct appeal. This court, relying on the prerequisites established in Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979), concluded that the trial court erred by allowing the prosecutor to argue about the missing witness. Bough, No. E2002-00717-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 17, at \*27. However, the court ruled that the error was harmless. Id. at \*29. Our supreme court agreed that the trial court erred and that the trial court's error was harmless. Bough, 152 S.W.3d at 464.

Given that the trial court overruled defense counsel's objection, we fail to see how counsel rendered deficient performance by failing to request a curative instruction. In any event, as the supreme court stated, "[T]he trial judge did explain to the jury before closing arguments that the



State had the burden of proof beyond a reasonable doubt. Further, the trial court fully and accurately instructed the jury on the difference between evidence and argument.” Bough, 152 S.W.3d at 463; see also Bough, No. E2002-00717-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 17, at \*29. Thus, this court and our supreme court found no prejudice to the petitioner. Without showing prejudice, the petitioner is not entitled to post-conviction relief on this issue.

#### E. Improper Jury Instruction

The petitioner contends that he received the ineffective assistance of counsel because his trial attorney failed to object to the trial court’s improperly instructing the jury on the incorrect underlying felony in the first degree felony murder instruction. The indictments reflect that the State charged the petitioner with first degree felony murder committed during the perpetration of a robbery and especially aggravated robbery. However, in its jury charge, the trial court instructed the jury on first degree felony murder with the underlying felony being especially aggravated robbery. Trial counsel testified he did not object because the instruction was to the petitioner’s benefit. As the post-conviction court concluded, the petitioner was not prejudiced by the trial court’s instructing the jury on the greater offense. Therefore, the petitioner is not entitled to post-conviction relief on this issue.

#### F. Counsel’s Investigation of the Case

Finally, the petitioner contends that trial counsel failed to investigate his case adequately. At the evidentiary hearing, the State introduced counsel’s time sheet for the case into evidence. According to the time sheet, counsel met with the petitioner on the following dates: August 2, 1999, for two hours; August 18, 1999; September 2, 1999, for thirty minutes; September 3, 1999; September 17 and 20, 1999; September 30, 1999, for thirty minutes; and October 15, 19, and 25, 1999. As the post-conviction court noted, this evidence directly contradicts the petitioner’s testimony that he met with counsel only two times. Moreover, the time sheet shows that after the petitioner posted bond and returned to California, counsel spoke with him many times and wrote letters to him. Counsel testified at the evidentiary hearing that in addition to meeting and corresponding with the petitioner, he hired an investigator to help with the case, visited the crime scene, and attended the codefendant’s pretrial, trial, and sentencing proceedings. The post-conviction court accredited counsel’s testimony over that of the petitioner and concluded that counsel adequately prepared for the petitioner’s case. We agree and conclude that the petitioner is not entitled to post-conviction relief.

### **III. Conclusion**

\_\_\_\_ Based upon the record and the parties’ briefs, we affirm the judgment of the post-conviction court.

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NORMA McGEE OGLE, JUDGE